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No. 609

In the Supreme Court of the United States

OCTOBER TERM, 1957

CLARENCE B. DANDRIDGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The *per curiam* opinion of the Court of Appeals, the Chief Judge dissenting (Pet. App. 18), is reported at 247 F. 2d 105.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1957 (Pet. App. 19). The petition for a writ of certiorari was filed on August 6, 1957, and granted on November 12, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the trial court abused its discretion in denying petitioner leave to withdraw his plea of guilty.

22 D. C. Code 502:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

22 D. C. Code 3204:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22–3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

Rule 32 (d), F. R. Crim. P.:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Rule 11, F. R. Crim. P., in pertinent part:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty,

and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. * * *

STATEMENT

A. THE PLEA OF GUILTY

On September 4, 1956, an indictment was filed in the United States District Court for the District of Columbia charging petitioner with having on July 8, 1956, "made an assault on Robert W. Allen with a dangerous weapon, that is, a loaded pistol." The second count charged petitioner with carrying a pistol without a license.

On September 7, 1956, petitioner, who was not then represented by counsel, pleaded not guilty (R. 2). His case was set for trial on October 4, 1956, but was on that day continued until October 16 because of lack of an available court room (R. 2, 6, 8). On the latter date, both sides announced ready and the court asked counsel to come to the bench and state the nature of the case. Mr. Stevas, Assistant United States Attorney, stated (R. 8–9):

> This is the case where the defendant Clarence B. Dandridge, is charged with assault with a dangerous weapon, that is, a pistol, and the second count charges him with carrying a dangerous weapon, to-wit, a pistol.
>
> I have informed counsel for the defendant the Government would have no objection to letting him plead to the first count and move to dismiss the second count at the time of sentencing if there was such an indication on the part of the defendant.

The COURT. What are the facts, Mr. Stevas?

Mr. STEVAS. The evidence will show, if Your Honor please, that the complaining witness was in the premises, the first floor of the same building that the defendant lived in. The defendant lived in the basement.

Without any altercation taking place at the time of the shooting, from the Government's evidence it will show that the defendant fired a pistol at the complaining witness and that he was in excess of 18 inches distant because there were no powder burns on the complainant. The bullet struck the complainant in the left shoulder.

The COURT. He was actually wounded?

Mr. STEVAS. Yes, he was wounded by the bullet.

We can find no argument that preceded this except the fact that the Government's evidence will show a statement by the defendant that, "You beat me up before and you are not going to do it again".

Those, very briefly, are the facts.

The complainant fell down when he was shot. The defendant was apprehended shortly afterward in possession of the gun.

The court then asked Mr. H. N. Blaustein, who had been appointed to represent petitioner, what his version was of the facts. He responded (R. 9–10):

Mr. BLAUSTEIN. The defendant's testimony would be that, on the night before, he was struck by the prosecuting witness, had a black eye and a fractured nose. During the following day there were two other attacks on him and this last one, I suppose he was a little upset

after being attacked three times and, unfortunately, he pulled this gun out and shot this man.

The COURT. Of course, that is no defense. Those matters might go into mitigation of sentence but certainly it is not self-defense.

Mr. BLAUSTEIN. I agree with Your Honor, except he does say that the prosecuting witness has frequently carried a razor.

The COURT. No. The prior assaults by the victim of an assault is not sufficient to justify self-defense.

Do you want to go to trial or are you interested in what Mr. Stevas has suggested?

Mr. BLAUSTEIN. Yes, Your Honor, I think the defendant is, but I would want to talk to him another minute or two.

The COURT. Of course.

After consulting with his client, counsel returned and stated that petitioner would withdraw his plea of not guilty. Then in open court the Government attorney stated that he had been informed by defense counsel that defendant was desirous of changing his plea to guilty under the first count of the indictment, with the understanding that at the time of sentencing the Government would move to dismiss the second count, which charged petitioner with carrying a dangerous weapon. He further stated that he had been informed that defendant had been advised of his right to a jury trial, that no promises had been made, and that defendant desired to enter a plea of guilty freely and voluntarily of his own will and accord. He further said that the plea would be acceptable because the second count was part and parcel of the first

count (R. 10). The court then asked to hear from defense counsel, who responded (R. 10–11):

> Mr. BLAUSTEIN. If the Court please, I have fully explained the circumstances and the consequences of this act to the defendant. I asked him to voluntarily make up his mind as to what he wanted to do. He has come to the conclusion that he will throw himself upon the mercy of the Court.
>
> The COURT. Have you apprised him of his rights?
>
> Mr. BLAUSTEIN. I certainly have, Your Honor.
>
> The COURT. Clarence B. Dandridge, do you admit that you committed the offense to which you propose to plead guilty?
>
> The DEFENDANT. Yes, sir.
>
> The COURT. The Court will accept the plea.
>
> The DEPUTY CLERK. Clarence B. Dandridge, in Criminal No. 906–56 in which you are charged with assault with a dangerous weapon, do you wish to withdraw your plea of not guilty heretofore entered and enter a plea of guilty to Count I which charges you with assault with a dangerous weapon?
>
> The DEFENDANT. Count I, yes, sir.
>
> The COURT. The case will be referred to the Probation Officer for the usual presentence investigation.

B. ATTEMPT TO WITHDRAW PLEA OF GUILTY BEFORE SENTENCE

Five days later, on October 21, 1956, petitioner wrote the following letter to the court:

> I am writing asking to change my plea of guilty to not guilty. At the time I am writing

this letter I am much better than I was on the 16th of Oct 1956 the day I plea guilty to the charge of assault with a dangerous weapon that is a loaded pistol. And at the time I plea guilty to the charge I was sick and was not myself. And on the next day which was the 17th Oct I became more sick and on the 18th Oct. they had to send me to the hospital which I am still in the hospital.

And on the 13th Sept 1956 that was the first time I taken sick and was in the hospital from 13th Sept until Oct 1st 1956. My lawyer tell me I have a felony charge against me which was a number charge in 1948. Your Honor Sir sentence me to two to six months in jail. Is that a felony charge on my record. So I come to a close. [R. 3.]

Judge Holtzoff forwarded this letter to the assignment commissioner, asking him to treat it as a motion for leave to withdraw a plea of guilty, and set it down for argument the following Friday (R. 3). At this hearing, November 2, 1956, the following took place (R. 11–12):

The COURT. In this case, the defendant pleaded guilty on October 16 to the first count of the indictment charging assault with a dangerous weapon, that is, a loaded pistol. He did so after being advised by counsel as to his rights and his counsel appeared with him at the time that he changed his plea.

The Court expressly asked him whether he committed the offense to which he desired to plead guilty and he answered expressly in the affirmative. At that time, the Government was

ready to go on and had its witnesses in the Court House. These witnesses, of course, were immediately dismissed after the plea was entered.

Since that time, however, the Court received a letter dated October 21 from this defendant asking to change his plea of guilty to not guilty. The Court ordered the letter to be treated as though it were a formal motion and set this down for this morning.

Clarence B. Dandridge, why do you ask for permission to change your plea? You pleaded guilty knowingly and you expressly admitted to the Court, when asked, that you committed the offense.

Why are you asking permission to change your plea?

The DEFENDANT. At the time I hadn't seen no attorney and I was sick.

The COURT. At that time you had an attorney, of course.

The DEFENDANT. I mean on July 9, I had an attorney at the Court, the first date, and I haven't seen him no more since.

The COURT. The Court appointed an attorney for you who consulted with you and who appeared with you at the time you changed your plea. I want to know why you are asking permission to change your plea.

The DEFENDANT. Because I couldn't get my witnesses together at the time because of being sick and nervous. I couldn't think of the addresses. There are two witnesses. I was sick. I came out on the 1st and I met my attorney on the 2nd and the trial was set for the 4th.

The COURT. When the Court asked you if you committed the offense, you said yes, that you did.

The DEFENDANT. I couldn't get my witnesses here.

The court then turned to the question of what those witnesses would be able to testify to if they were present (R. 12):

The COURT. What is your defense?

The DEFENDANT. I have witnesses to prove that I did it in my self-defense. I mean I couldn't get the names. My wife knew them at the time.

The COURT. Suppose you tell me what you claim to be self-defense.

The DEFENDANT. He had been beating me three times that day and came across the street and I said I will wait until he leaves before I go home. Then when I went home, he started to be[a]t me again. That is the time I shot him. Where I live, he beat me three times in my own house and the officers, when I went to court, I had two black eyes and a fractured nose and so at the time, being sick——

The COURT. Then you fired your gun at him, didn't you?

The DEFENDANT. Yes, when he started to me, yes.

The COURT. What did he beat you with?

The DEFENDANT. I don't know. I had a fractured nose and two black eyes.

The COURT. With his fist?

The DEFENDANT. I guess so. I was trying to get out of his way each time, three separate times.

The COURT. The Court was informed at the time that your plea was entered that the man you shot has become paralyzed as a result of your shooting him.

The DEFENDANT. I heard that too, sir.

The court then took the matter up with defense counsel (R. 12–13):

The COURT. Does counsel for the defendant wish to say anything?

Mr. BLAUSTEIN. Frankly, I have nothing to say, Your Honor. I went over this matter entirely with him before he entered his plea of guilty. He knew the circumstances and I believe we explained all of that to Your Honor at the time and I was very much surprised when he wanted to change his plea. However, I interviewed several of the witnesses and I could not get any material evidence out of them that I felt would be helpful to him, even his own wife. However, if he has discovered some other witnesses and he wants to go to trial and the Court feels he should go to trial, I am prepared.

The DEFENDANT. I have two more witnesses.

The COURT. What will they testify to?

The DEFENDANT. That this Allen witness will testify that he came across the street after me so that he could stop this fellow from fighting me. I asked him why he didn't want me to go home and he said, "Robert was waiting to fight me." And I said, "I will wait until he goes."

The other witness was when he was taking me to headquarters. I asked him to take me to give the gun up. The old little lady where I lived, she was nervous, I would never have

left the house. I stayed there until the law come.

The COURT. You have not said anything to justify the shooting.

The Government attorney was then given an opportunity to state his views (R. 13–14):

Mr. STEVAS. If Your Honor please, you will recall we had our witnesses here. The complainant was here in a wheelchair. Counsel for the defendant approached the bench, Your Honor will recall, and discussed the possibility of his client [wishing] to change his plea.

I asked Your Honor to have the record indicate, and the record did indicate, that counsel took an opportunity to discuss the matter over further with his client before this plea was entered. After a short interval, when he did discuss it with his client, the defendant was then brought forward.

I made the statement that he was pleading because I was informed that he was going to plead because he was guilty and for no other reason.

The witnesses were here, the jury was here and we were ready to proceed. Notwithstanding that, the defendant chose to change his plea and enter a plea of guilty because he was guilty and for no other reason.

The Government feels, at this stage now, we having been ready for trial, that the plea should stand. It was intelligently entered at the time.

The record will show the case was up on October 4 and was continued on that date until October 16, almost two weeks later from the

date of October 4 and the same counsel represented the defendant but no court was available on October 4.

In view of all those circumstances, the defendant having been indicted in this case in September and counsel appointed in September, he had adequate opportunity to consult with him, but from what he says today, there is no evidence from the witnesses that he proposes to call, that they would not even testify to any issue of self-defense because what they are testifying to is what occurred even prior to this shooting which took place in the home.

Having given this opportunity to the petitioner, to his counsel, and to the Government to speak on the matter, the court announced its own conclusions (R. 14):

The COURT. The Court is of the opinion that the ends of justice do not require that the defendant be permitted to withdraw his plea of guilty. He entered the plea deliberately. He expressly admitted his guilt in open court and now, on his own statement, he does not set forth sufficient facts which would warrant a plea of self-defense. He does not deny that he shot the complaining witness but he claims that he did so in self-defense but, on his own statement of the facts, even if those facts were as he contends them to have been, they are not sufficient justification for a plea of self-defense. In any event, certainly he did not think there was when he pleaded guilty.

The motion for leave to change the plea is denied.

On December 7, 1956, the Government dismissed the second count, as had been previously understood

at the time the plea of guilty was entered, and the court sentenced petitioner from three to nine years on the first count (R. 4–5).

C. ATTEMPT TO WITHDRAW PLEA OF GUILTY AFTER SENTENCE

Thereafter, on December 13, petitioner wrote a letter to the clerk of the District Court in which he stated that he wanted to appeal his case on the ground of "insufficient" counsel; that he had been sick in the jail hospital from September 13 to the first of October; that the first time he had seen his attorney was on October 2, two days before his case was first set for trial; that on October 16 he went back to court and pleaded guilty to assault with a dangerous weapon; that within forty-eight hours after that he was carried back to the hospital on a stretcher, and was given penicillin and ice packs for three days; that, when he began to feel better and realized what he had done, he wrote to Judge Holtzoff telling him he was sick and not himself when he pleaded guilty; that when they had the hearing in court in November, he could not get the words together because he was still sick and was still in the hospital (R. 6).

This letter was filed on December 20, 1956. On January 2, 1957, the court, treating it as a repetition of the prior motion to withdraw his plea of guilty, overruled it (R. 6, 8). On January 8, the court overruled petitioner's application to proceed without payment of costs, on the ground that the appeal was not taken in good faith (R. 7).

Thereafter, the Court of Appeals granted petitioner leave to appeal in forma pauperis, present counsel for petitioner (Mr. Dunau) being appointed by that court. Petitioner was granted leave to file affidavits supporting his version of the events leading up to the shooting and also relating to his physical condition at the time he pleaded guilty, and the Government was given permission to file a supplemental memorandum and counter-affidavits (R. 26–27).

Petitioner's affidavit stated that he saw Mr. Blaustein, the attorney whom the District Court appointed for him, for the first time on October 2, 1956. They consulted then for about thirty minutes and on the following day for about forty or fifty minutes. They were together again on October 16, the date on which petitioner pleaded guilty, and on November 2, when petitioner was trying to explain to the court why he wanted to change his plea to not guilty. On the day of their first interview, he stated, the attorney suggested that he plead guilty to the assault charge if the gun carrying charge were dropped. Petitioner stated that he would not do that because he was not guilty of assault, but that he was willing to plead to the gun carrying charge if the assault charge were dropped. The following day, the attorney reported that only the first arrangement was acceptable to the Government, but petitioner would not accept this (R. 17–18).

Petitioner further stated that the trial was set for the following day and that he was feeling pretty good then, but it was put off until October 16. On that

day, petitioner was sick—nervous and shaky, upset with pain, couldn't pass water, and had sweat spells. He couldn't put his words together, but he was in such pain that to get it over with he had pleaded guilty (R. 18).

The affidavit also stated that petitioner was 46 years old, five feet eight inches tall, weight about 160 pounds; whereas Robert Allen (the complainant) was 42 years old, five feet nine inches tall, weight at least 190 pounds, was heavily built and broad chested. According to the affidavit, petitioner was no match for Allen (R. 18).

As to the circumstances which preceded the shooting, petitioner stated that Allen had assaulted him four times on the day of the shooting, each time on the first floor of the house in the basement of which petitioner lived. The first time was about twenty minutes after midnight of that morning, which was a Sunday. Petitioner was watching television when Allen asked him to come over to him. Petitioner replied "in a minute" and the next thing Allen hit him twice across the mouth and nose with his fist or hand, drawing blood and causing petitioner's lip to swell up. A friend of both, by the name of Taylor, separated them. The second time, about 8:00 A. M. of the same day, Allen hit him in the nose and eye, blackening his left eye and fracturing his nose. Allen hit him a great number of times, knocking him back on the edge of the dining room table, and again Taylor separated them. The third time was about one o'clock of that afternoon, when Allen struck him a number of times, blackening his other eye (R. 18–19).

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About 10:30 that night, petitioner was visiting across the street when Taylor came to say that Allen was waiting to fight him again. He told Taylor to take Allen home, which the latter promised to do. Shortly before midnight, petitioner went home and was trying to open the door to the dining room, which leads to his quarters in the basement, when Allen rushed toward him with his right hand up, containing something in it which was shining. Petitioner knew that Allen carried a razor, as the latter had shown it to him many times. He shot Allen to defend himself and Allen fell on his left foot (R. 19).

Petitioner stated that he did not know why Allen kept assaulting him, except that he had been drinking. Allen had sent word later saying that it was his own fault and he did not want to press charges (R. 19).

Also filed was the affidavit of petitioner's present attorney, Mr. Dunau, relating to his requests for information as to the hospitalization of petitioner in the District Jail Infirmary and in the District of Columbia General Hospital (R. 20). Dr. Richard V. Mattingly, Senior Medical Officer at the District Jail, replied that petitioner had been admitted to the Infirmary on October 18, 1956, with a diagnosis of epididymitis, an infection of the epididymis, probably secondary to an old venereal infection. On October 25, he was seen in the Genito-urinary Clinic at the D. C. General Hospital. He was discharged as cured on November 5, but was treated for residual urethral stricture at the clinic on November 21 and December 20, 1956, and on January 17 and 24 and February 14, 1957. He was returned to the District Jail from

Lorton Reformatory on April 19, 1957, for stricture dilatation (R. 21). Dr. Mattingly also stated, in response to a letter from Mr. Dunau quoting from a medical work as to the symptoms of the disease (R. 22), that ice packs were used as adjunct treatment to antibiotics and that the condition was, as Mr. Dunau had stated, a painful one (R. 23).[1]

The Government's supplemental memorandum, similarly quoting from medical works, sought to show that the onset of the attacks of which petitioner complained are typically sudden; that the attack on October 18 would not indicate he was suffering therefrom on the 16th, the day of his guilty plea; that if petitioner had in fact been suffering therefrom on the 16th, the symptoms could not have been hidden from counsel, the court, and court attendants (R. 27–28).

The affidavit of Mr. Blaustein, filed with the memorandum, stated that he had conferred with petitioner several times, when he ascertained the latter's version of the facts and advised him as to his rights. On the day the case was set for trial, he conferred at the bench with the Government attorney and with the

[1] The Registrar for the District of Columbia General Hospital informed Mr. Dunau that petitioner had been admitted to that institution on July 22, 1952, with a urethral stricture. Petitioner responded well to treatment and was discharged on July 29. He was readmitted on January 22, 1954, for pneumonia and was discharged on restricted activity on January 29, 1954. He was readmitted from the District Jail on September 15, 1956, suffering from multiple urethral strictures with acute cystitis. Following dilatations and antibiotic therapy, his hospital course was uneventful and he was discharged on September 29. He had attended the clinic on seven subsequent occasions, at most of which urethral dilatations had been done (R. 24–25).

court and then spoke again with petitioner, fully advising him as to all his rights, including that of a jury trial. Petitioner had stated that he would like to change his plea to guilty. Petitioner did not complain that he felt ill or had any pain. He spoke coherently, had perfect composure, and appeared to be in good health. Petitioner was fully aware that he would be sentenced on a later date. Affiant further stated that he had interviewed several of petitioner's witnesses, including his wife, but did not receive any information material to the defense of the case (R. 29–30).

In a *per curiam* opinion of the Court of Appeals, from which Chief Judge Edgerton dissented, the court found no abuse of discretion in the denial of leave to withdraw the plea of guilty (R. 15).

DISCUSSION

The decision below was entered on July 8, 1957. This Court granted certiorari on November 12, 1957. On the latter date, as petitioner's brief (p. 23) points out, a different panel of the same court[2] decided the case of *Poole* v. *United States*, 250 F. 2d 396, which also involved an application, made prior to sentencing, to withdraw a plea of guilty.[3] In holding that

[2] The panel consisted of Circuit Judges Washington, Bazelon, and Danaher. The instant case was decided by Chief Judge Edgerton (who dissented) and Circuit Judges Prettyman and Burger.

[3] In *Poole*, the defendant had pleaded guilty to three indictments without the advice or representation of counsel. When counsel for defendant was appointed, he was instructed to report back if, in his opinion, the facts were inconsistent with the pleas. After some thirty minutes' consultation, he reported

the trial judge had erred in denying the application, the court in *Poole* stated (p. 400) that "Leave to withdraw a guilty plea prior to sentencing should be freely allowed" and " 'that a plea of guilty at that time [arraignment] can be and often is changed, on proper motion, *as a matter of course*' " (quoting the court's prior decision in *McJordan* v. *Huff*, 133 F. 2d 408, 409).

Because of the seeming breadth of this language in a supervening decision by the same court, and in the light of this Court's recent admonition in *Wisniewski* v. *United States*, 353 U. S. 901, 902, that "desirable judicial administration commends consistency at least in the more or less contemporaneous decisions of different panels of a Court of Appeals," we were led to reexamine our position in the instant case. On the basis of that reexamination, we have concluded that *Poole* is readily distinguishable because of the special

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back that in his opinion the pleas should stand. At the sentencing three weeks later, defendant asked to withdraw his plea of guilty, claiming mental incompetency at the time of the offense. The court refused to entertain such a motion because not in writing and suggested to defense counsel that any mental examination be made after sentencing and then, if the facts indicated defendant was not guilty, he could file a motion. Apparently defendant was never examined and nothing further occurred until, three years later, he filed a motion to vacate the judgment. Relief was denied by the District Court, which was reversed by the Court of Appeals because of the totality of the various factors involved—the lack of representation at the time of the plea, the instructions to defense counsel to report to the court if there should appear that the facts were inconsistent with the plea, the refusal to entertain an oral motion to withdraw the plea at the time of sentencing, the suggestion to counsel that he not press the question of mental incompetency at that time but to save it until after sentencing.

facts there involved,[4] but that in any event a remand of this case is required on other grounds (*infra*, pp. 24–26).

I

In our view, the *Poole* decision represents only a particular application of the basic rules stated by this Court in a dictum[5] in *Kercheval* v. *United States*, 274 U. S. 220, 223:

> A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound. *United States* v. *Bayaud*, 23 Fed. 721. But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence. *Commonwealth* v. *Crapo*, 212 Mass. 209. The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just.

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[4] See note 3, *supra*.

[5] The actual decision in the case was that a plea of guilty which had been withdrawn could not subsequently be introduced into evidence for any purpose.

These principles have been applied in numerous cases in addition to *Poole*. One decision frequently cited which sets forth the considerations which will enter into a determination of such a question is *Williams* v. *United States*, 192 F. 2d 39-40 (C. A. 5):

> Courts are always diligent to ascertain whether a plea of guilty was freely and understandingly entered. A defendant, however, does not have an absolute right to withdraw a plea of guilty, even though the motion so to do be timely made. Such a motion is addressed to the sound, but reviewable, discretion of the trial court. Where it clearly appears that the guilty plea was entered by the defendant in justifiable ignorance of his rights, or that he did not understand the consequences of his actions, or acted as a result of fear, coercion, or mistake, such circumstances are usually held to justify the granting of such a motion. To constitute a sufficient reason for withdrawal of the plea, however, the circumstances must amount to a fraud or imposition upon the defendant, or a misapprehension of his legal rights. Such a motion should never be denied where the ends of justice would be best served by granting it.

A motion for withdrawal of a plea thus calls for the exercise of careful discretion by the trial judge on the basis of the particular facts presented by the individual case. Undoubtedly, as Rule 32 (d) of the Federal Rules of Criminal Procedure indicates, a motion to withdraw a plea if made before sentence should be considered with greater liberality than one made after sentence (when withdrawal is permitted

only to avoid "manifest injustice"). But it does not follow that a motion to withdraw prior to sentence must be automatically granted. Such a motion is still addressed to the discretion of the trial court, and there must be some real showing that the plea was involuntarily or improvidently entered before withdrawal will be permitted. *Goo v. United States,* 187 F. 2d 62 (C. A. 9), certiorari denied, 341 U. S. 916; *Williams* v. *United States,* 192 F. 2d 39 (C. A. 5), *supra; Farnsworth* v. *Zerbst,* 98 F. 2d 541, 543 (C. A. 5); *United States* v. *Panebianco,* 208 F. 2d 238 (C. A. 2), certiorari denied, 347 U. S. 913; *United States* v. *Colonna,* 142 F. 2d 210, 211 (C. A. 3); *United States* v. *Ballerstedt,* 234 F. 2d 526 (C. A. 3), certiorari denied, 352 U. S. 930.

The judge is under a duty to consider all factors—the voluntary nature of the original plea, the reason for the change of heart, the interests of the Government and the witnesses—in determining whether permission to withdraw the plea should be granted. On such an issue, the decision of the trial judge, with his greater opportunity to observe the demeanor of the parties, and his knowledge of the capacity and standing of local counsel, is entitled to great weight. For that reason, the decisions are consistent to the effect that the appellate courts will interfere with the discretion of the trial judge only where abuse of discretion is clearly shown. See, *e. g., United States* v. *Colonna,* 142 F. 2d 210, 211 (C. A. 3); *Farnsworth* v. *Zerbst,* 98 F. 2d 541, 543 (C. A. 5); *United States* v. *Ballerstedt,* 234 F. 2d 526, 527 (C. A. 3), certiorari denied, 352 U. S. 930.

The Court of Appeals for the District of Columbia Circuit had noted, prior to the decision in the instant case, that withdrawal of a plea of guilty, entered at arraignment, by a defendant who was without counsel, "can be and often is changed, on proper motion, as a matter of course." *McJordan* v. *Huff*, 133 F. 2d 408, 409. It has, since the decision below, reaffirmed that ruling with respect to a similar factual situation in the *Poole* case (*supra*), indicating (p. 400) that it would apply that same principle even if the defendant were represented by counsel at arraignment.

But no appellate decision to our knowledge has applied that principle in a case such as this. Petitioner, it should be noted, seeks to change his plea a *second* time. At arraignment, he had pleaded not guilty; this plea was subsequently withdrawn just as trial was about to begin and a plea of guilty (the plea petitioner now seeks to withdraw) substituted after full opportunity to consult with counsel and with careful consideration by the trial judge as to whether the plea of guilty was knowingly and voluntarily entered.[6] Under such circumstances, as the decisions cited above (*supra*, p. 22) have recognized,

[6] Often, even where a defendant is represented by counsel at arraignment, counsel has recently been appointed and consultation is hurried. Thus, in *United States* v. *Panebianco*, 208 F. 2d 238 (C. A. 2), certiorari denied, 347 U. S. 913, which the *Poole* decision cites (together with the decision in the instant case) as a decision to be compared with its ruling, one of the factors noted by the trial judge in denying a motion for leave to withdraw before sentence was that the guilty plea was not entered "in the hurried routine * * * of the calendar part" (see the Government's brief in opposition, No. 518, 1953 Term, p. 10).

a trial judge is not required to permit withdrawal of a guilty plea, even before sentencing, merely because the defendant wants to. This is even shown by the principal case on which petitioner relies. See *Bergen* v. *United States* 145 F. 2d 181, 186, 187 (C. A. 8). And *Poole* is not to the contrary. A "fair and just" reason (*Kercheval, supra*) is still essential to justify withdrawal.

II

In the instant case, however, we have been compelled to conclude, on reexamination, that the record is deficient in that it does not specifically resolve a factual issue bearing directly on whether petitioner had such a "fair and just" reason for withdrawing his guilty plea.

The record shows that, before the original plea of guilty was accepted in this case, the trial court was careful to ascertain that it was knowingly and voluntarily entered with full understanding of the charge. When the case came up for trial, the judge called the lawyers to the bench and asked them what the facts were. Each made his statement in brief form. The Government indicated its willingness to dismiss the second count, for carrying a dangerous weapon, if the petitioner wished to plead guilty to the assault charge. Defense counsel stated he thought his client was interested in the suggestion, but would like "to talk to him another minute or two" (R. 9–10), indicating that they had already given consideration to a plea of guilty. He returned and told the court that his client had decided to withdraw his plea of not guilty. In open court, the petitioner of course being

present, Government counsel stated that he had been informed that petitioner was desirous of changing his plea, with the understanding that at the time of sentencing the second count would be dismissed; that he had further been advised that petitioner had been informed as to his right to jury trial, that no promises had been made, and that petitioner was doing so freely and voluntarily, of his own free will and accord (R. 10). Defense counsel then addressed the court and said that he had fully explained to his client the consequences of a plea of guilty and had asked him voluntarily to make up his own mind as to what he wanted to do; that his client had come to the conclusion that he would throw himself upon the mercy of the court. In response to a question of the court, counsel said that he had apprised petitioner of his rights (R. 10). The court then turned to petitioner himself and asked him if he admitted committing the offense, to which the latter replied, "Yes, sir." The clerk then asked him if he wished to withdraw his plea of not guilty and enter a plea of guilty to count 1, charging assault with a dangerous weapon, to which he answered, "Count 1, yes, sir" (R. 10–11).

Certainly, on the face of the record, the trial judge was justified in accepting the plea as voluntarily entered. The difficulty is that the record is not similarly dispositive of petitioner's present claim (Pet. Br. 25–30) that his plea of guilty was entered while he was suffering from a disabling illness which prevented him from making a knowing and intelligent waiver of his right to a trial. Obviously, if this claim were true, petitioner had a "fair and just" reason (*Kercheval, supra*)

for seeking withdrawal. On the other hand, if his claim is without substance, then it seems to us equally plain that the trial judge did not abuse his discretion in refusing to permit withdrawal of the plea.

The record, however, is incomplete on this issue, notwithstanding the fact that the chronology of his hospitalization precludes rejection of the claim as frivolous. The trial judge, who had observed petitioner's appearance and behavior at the time of the plea and hence had personal knowledge as to petitioner's prior condition (as well as the standing and reputation of defense counsel), may well have tacitly found the claim to be unfounded, but he did not do so expressly and did not take any testimony on the issue.[6] Nor did the Court of Appeals make such a finding, although affidavits not before the trial judge were submitted to the Court of Appeals by both sides.[7] So long as this critical factual issue remains unresolved, we believe that the legal question of whether petitioner is entitled to withdraw his guilty plea cannot properly be decided.

CONCLUSION

For the reasons set forth in Point II (*supra*), it is respectfully submitted that the judgment below should be vacated and the case remanded to the District Court with directions (*a*) to determine the validity of petitioner's claim of disabling illness on the date of his guilty plea, or (*b*), if the District Court concludes

[7] The Government's affidavits (Statement, *supra*, p. 17) are to the effect that petitioner's symptoms would have been apparent if he had been suffering from an attack at the time of the plea.

that such a determination is not feasible at this time because of the unavailability of pertinent evidence, to grant petitioner's motion to withdraw his plea.

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MARCH 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958